SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 343.

JOSEPH RALPH BURTON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

SUPPLEMENTAL BRIEF FOR THE PLAINTIFF IN ERROR.

The court at St. Louis had no jurisdiction to try the cause, nor is such jurisdiction conferred by section 731, Revised Statutes of 1878.

The indictment in this case charges a violation of section 1782 in the respect that services were performed in the Post-Office Department at Washington to prevent the issue by the Post-Office Department of what is known as "a fraud order," the accused being at the time a Senator of the United States and performing such services for compensation. Section 731 of the Revised Statutes of the United States is invoked to sustain the jurisdiction of the United States district court in St. Louis for the reason that, as alleged in the indictment, the compensation for such service was actually paid

to Burton in St. Louis, and that such payment was necessary to complete the offense, or, as the judge trying the case in St. Louis repeatedly ruled and asserted: "The acceptance of compensation is the gist of the offense." It was alleged in the indictment and assumed by the court that the services, if any, that were rendered or to be rendered were done and performed in the District of Columbia and in the Post-Office Department in said District. It is therefore contended by the Government that under section 731 Senator Burton might be indicted, prosecuted, and punished either in the District of Columbia or in the eastern district of Missouri, and the Government, by reason of such section, had a full right to elect to present this case for indictment in that district and to try him in the city of St. Louis. We deny this right, and further deny that the District of Columbia is within any category or description of jurisdiction or tribunal included within the terms of section 731.

In the Revised Statutes of 1878 marginal reference is made on page 139 to section 30 of chapter 169, 14 Statutes at Large, page 484. This is the original statute from which revision was made and from which section 731 was drawn and collated. By reference to that act it will be seen it was an act to amend the existing laws relating to internal revenue and for other purposes. This particular provision of the act undoubtedly had reference, as its context shows, to conspiracies to defraud the United States in matters of revenue. The language of section 30 of chapter 169 of the Session Laws of 1867 is as follows:

"And when any offense shall be begun in one judicial district of the United States and completed in another, such offense shall be deemed to have been committed in either of the said districts, and may be dealt with, inquired of, tried, determined and punished in either of the said districts in the same manner as if it had been actually and wholly committed therein."

By comparing this language with section 731 of the revision it will be observed that in such revision the language has been carefully and deliberately changed. The omission of the words "of the said district" seems to have been deliberate and purposed. By section 731 as it stands, the prerequisite to the trial in more than one jurisdiction of an accused person for any offense begun in one place and ended in another is, that such offense shall have been begun in one "judicial circuit" and completed in another "judicial circuit," and in such event only would the offense be deemed to have been committed in part in one jurisdiction and completed in another jurisdiction. The language which follows, to the effect that it may be "punished in either district," clearly does not obviate the essential requirement of the preceding clause of the statute.

A "judicial circuit" of the United States, in the language of the law and of the statutes of the United States, is as definite, well understood, and limited a term as is the term "judicial district." It must also be remembered that section 731 of the Revised Statutes is a part of the general title "the judiciary," and is to be read in connection with the general definition and use of words under that title. The title deals with questions of jurisdiction and procedure of the Federal courts. Chapter 1 of this title number 13 relating to the judiciary deals with the subject of "judicial districts." Section 530 is as follows:

"The United States shall be divided into judicial districts as follows," and here follows a list of judicial districts established by the act. They are confined to districts in the States of the Union, and do not include in the enumeration the courts of any Territory or of the District of Columbia. This is made plain by section 569:

"When any Territory is admitted as a State and a district court is established therein the said district court shall

take cognizance of all cases which were pending and undetermined in the superior court of such Territory, etc., etc."

A "judicial circuit" of the United States, in the language of the law and of the statutes of the United States, is as definite, well understood, and limited a term as a judicial district. There are nine judicial circuits. Under the same title number 13, "the judiciary," by section 604, judicial circuits are provided for and defined under the following heading of the chapter "JUDICIAL CIRCUITS." The language of the first paragraph of the act is as follows:

"The judicial districts of the United States are divided into nine circuits as follows:"

The first circuit including the districts of Rhode Island, Massachusetts, New Hampshire, and Maine. And so the act continues up to the provision for the eighth circuit. When this revision was made the eighth circuit included the districts of Colorado, Nebraska, Minnesota, Iowa, Missouri, Kansas, and Arkansas. By subsequent legislation other States have been added to the eighth circuit.

It therefore appears by the terms of this act judicial districts and judicial circuits are clearly described and defined and distinguished. In no instance, so far as we have been able to discover in the statute, are the words "judicial district" and "judicial circuit" used convertibly and as synonymous. That the nature of the title and chapters relating to judicial districts and circuits may be made clear, we reproduce the chapter heads and text as they appear in the revision.

Revised Statutes, 1878.

TITLE XIII.

THE JUDICIARY.

CHAPTER ONE.

JUDICIAL DISTRICTS.

"The United States shall be divided into judicial districts as follows: The States of California, Connecticut," &c. [all *States* and the District of Columbia is not among them].

CHAPTER FIVE.

JUDICIAL CIRCUITS.

"The judicial districts of the United States are divided into nine circuits, as follows:"

[Here follow circuits, including districts, and the District of Columbia is not among them.]

"SECTION 731. When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein."

We make, therefore, two points, both equally fatal to the jurisdiction of the court in St. Louis:

First. That the words "judicial circuit" are used by Congress advisedly and cannot, in a matter relating to life and liberty, be altered by the court for any purpose; and the District of Columbia is no part of any judicial circuit, the judicial circuits being confined to the union of districts into

circuits theretofore defined, all such districts being wholly within the limits of organized States of the Union.

Second. That if it were in the power of the court to change the language of the act and to declare the legislative intention to be that the word "circuit" should read "district," it would not aid the jurisdiction, because the districts referred to in section 731 are the districts within the terms of title number 13, "THE JUDICIARY," and that section exclusively applies to districts within organized States, and has, and can have, no reference to the jurisdiction of courts within the boundaries of the territory or of the District of Columbia. It will be noticed that the learned solicitor general has, on page 65 of his brief, sought to correct the statute by substituting the word "district" for "circuit" in what purports to be a copy of section 731. We presume this is an inadvertence resulting from correcting proof without comparing his copy with the original statute, but the statute still reads "circuit" and not "district." It has not been changed since the revision of 1878.

The question thus distinctly arises on the face of the indictment. Two elements or ingredients are essential to constitute the offense charged against the defendant: *First*, the rendering of prohibited services in the Department; *second*, the receipt of compensation for such services. Both are essential to the completion of the offense.

The indictment in this case in each and all of the counts alleges that the services rendered by the defendant were so rendered in the Post-Office Department of the United States. The indictment also alleges in each and all of the counts that the compensation for such services was received by the defendant at the city of St. Louis, in the eastern district of Missouri.

Section 731, R. S., was intended to meet the case where some of the acts material and essential to the crime charged

in the indictment and requisite to its completion occur in one Federal jurisdiction and some of such acts in another Federal jurisdiction, and it provides that in such case the accused may be indicted, tried, and punished in either jurisdiction. It provides for no other case than the one where some of the acts essential and material to the crime and requisite to its consummation occur in one Federal jurisdiction and some in another Federal jurisdiction. The indictment shows on its face that the services alleged to have been rendered by the defendant which are essential to the consummation of the offense were rendered in the city of Washington, in the District of Columbia, and that the compensation alleged therefor, which is also essential to the completion of the offense, was received by the defendant in the city of St. Louis.

The Sixth Amendment of the Constitution of the United States provides as follows:

"In all criminal prosecutions the accused shall be entitled to a speedy and public trial by an impartial jury of the *State and district* wherein the crime shall have been committed, which district shall have been previously ascertained by law."

This makes more definite the provision in article 3, section 2, of the Constitution, which ordains that the trial "*shall* be held in the *State* where the crime was committed." The Constitution in this Sixth Amendment states that the trial must be in the State and district where the crime has been committed—that is to say, in all cases the trial must be within the limits of a State, and if a State has more than one judicial district the trial must be in that district of the State in which the crime was committed.

At common law and under the Constitution of the United States, and in the absence of statute where a crime consists of two acts, one done in one jurisdiction and another in another jurisdiction, no prosecution can be had in either. (See our Main Brief, pp. 162, 163, 164, 166, 167, etc.)

Therefore, in the absence of statute so providing, Senator Burton could not be tried in St. Louis for the offense alleged in the indictment.

The words "judicial district" as used all through Title XIII, "The Judiciary," never include the District of Columbia or the Territories. On the contrary, whenever this Title XIII has any provision in respect of the District of Columbia it mentions the District of Columbia by name, as, for example, in section 705, when it provides that "final judgment or decree by the supreme court of the District of Columbia," etc., may be reviewed by the Supreme Court of the United States, and also in section 811, where there is a provision as to grand juries in the "District of Columbia," the language being "the *circuit* and *district* courts, and the district courts of the *Territories*, and the supreme court of *the District of Columbia* may discharge their grand jurors," etc. So also the provision in section 871 and section 874 providing for depositions in the "District of Columbia" in suits pending elsewhere.

So also this Title XIII, when it refers to a Territory or to the courts of a Territory, mentions the Territory or the courts of the Territory by that name.

The Revised Statutes do not deal generally with the Territories, or with the courts of Territories, or with the District of Columbia, or the courts of the District of Columbia under this Title XIII, "The Judiciary."

Section 731, R.S., which is itself in Title XIII, reads "judi cial circuit," which means only "judicial circuits" defined in Title XIII, composed of the "judicial districts" defined in Title XIII, in the organized States.

The revisers in 1878 must be presumed (nothing appearing to the contrary) to use the words "judicial circuit" or "district" as they had defined them in Title XIII, and they there limited them to judicial circuits and districts in the several States of the Union, and the words do not include any judicial district, much less any judicial circuit in the

Territories or in the District of Columbia. If this section 731 were to be construed as meaning anything else, it would be contrary to article 3, section 2, of the Constitution of the United States and contrary to the Sixth Amendment.

Suppose a man committed a crime consisting of two parts, one in the State of Colorado and the other in the Territory of New Mexico, both parts being essential to the existence of the offense. The offender could not be punished in any court of the Territory of New Mexico for that part of the offense which was committed in the State of Colorado for the reason that article 3, section 2, and the Sixth Amendment of the Constitution of the United States provide that the trial of the crime *shall* take place in the *State and district* in which the offense was committed, and, in the case stated of an attempt to try such a crime in New Mexico for an offense committed in Colorado, the crime would not be tried in the *State* and district in which it was committed.

The same principle applies to a crime consisting of two parts, one part committed in a State and one part in the District of Columbia.

As to an offense committed, one part in a State and one part in a Territory, it cannot be held that section 731 would authorize the trial of such crime in a State on the theory that that part of the statute which undertakes to authorize the trial in a Territory (if such construction were to be placed upon it) could be stricken out as separable, and thus leave the statute to stand as a valid statute authorizing the trial in a State, for the words which it would be necessary to strike out are not separable from the rest of the statute. On the contrary, if the words which (on such a construction) undertake to make the offense triable in a Territory be stricken out, the operative part of the statute is stricken out and nothing remains under which the offense could be tried in the State. These words are, "it shall be deemed to have been committed in either and may be dealt with, inquired into and determined and punished in either."

The statute does not read that the offense shall be deemed to have been committed in the State, and that it may be punished in the State, but that it shall be deemed to have been committed in "*either*" (State or Territory).

We therefore maintain that whether section 731 be construed as it now reads, "judicial circuits," or whether it shall read "judicial districts," it could not give and did not give to the District Court of the United States for the Eastern District of Missouri any jurisdiction to try the offense alleged in the indictment; for in either event the alleged offense was not begun in one "judicial circuit" or in one "judicial district" within the meaning of section 731, and such offense completed in the Eastern District of Missouri, and therefore section 731 in any view has no application to the case.

This question arises on the face of the indictment which is a part of the common-law record and is reviewable on a writ of error. The question also arises on the motion made by defendant at the end of the Government's testimony for a direction of a verdict of not guilty, and also on a similar motion made by defendant at the close of all the testimony, and also on the final judgment.

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